Filed 1/14/13 In re M.M. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re M.M. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. S.K., Defendant and Appellant.	E056451 (Super.Ct.No. J-232538, J-232539, J-232540) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Barbara A. Buchholz, Judge. Affirmed.

William D. Caldwell, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, and Danielle E. Wuchenich, Deputy County Counsel, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant, S.K. (Mother), appeals from the juvenile court's orders denying her petition to reinstate her reunification services for her three daughters, M1, M2, and M3, terminating her parental rights to the girls, and placing them for adoption. (Welf. & Inst. Code, §§ 366.26, 388.)[1] We affirm the challenged orders.

Mother claims the court violated her due process rights in failing to order plaintiff and respondent, San Bernardino County Children and Family Services (CFS), to provide her with transportation assistance to the final day of the sections 388 and 366.26 hearings. She claims the court also violated her due process right to present evidence by refusing to continue the hearings a second time to allow her to locate a witness, and by concluding the hearings in her absence.

We reject Mother's claims. As we explain, the court had no authority to order CFS to provide Mother with transportation assistance to the final day of the hearings. Nor did the court abuse its discretion in refusing to continue the hearings a second time, and indefinitely, to allow Mother more time to procure the testimony of her witness.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Dependency Proceedings Through the Termination of Mother's Services*

In March 2010, three-month-old M3 suffered nonaccidental skull and leg fractures while in Mother's care. Mother claimed she was in the bedroom with M1 and M2, then

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

ages three years and 18 months, respectively, when M3 fell from a couch and hit her head on a dice on the family room floor. Mother called 911 and an ambulance and law enforcement responded. At the hospital, doctors discovered that M3 also had a fractured right leg that was in the process of healing, and opined that both the skull and leg fractures were nonaccidental.

The girls' father, who was not married to Mother, said he moved out of the family home several weeks before M3 suffered the skull fracture. The father also denied responsibility for M3's leg fracture and said he thought Mother was responsible. Mother was 22 years old and the father was 20 years old when M3 suffered the skull fracture in March 2010. The parents had been together for five years before the father moved out of the home.

In April 2010, section 300 petitions were filed, and the girls were ordered detained and placed in confidential foster care. In a May 2010 jurisdictional/dispositional report, CFS recommended no reunification services for either parent, and supervised visitation. The social worker opined that neither parent was likely to benefit from reunification services within a reasonable time, and reunification services would not serve the best interests of the girls.

The father wanted the girls placed with Mother, and only wanted visitation. But during visits, he was physically "rough" with the girls, often ordered them around, and had little patience for them. Both parents lacked parenting and household management skills. Mother had a high school diploma but was unemployed and had learning

disabilities. Without the father's income from a legal settlement, Mother's only source of income was state aid, and she did not own a car.

At age three, M1 weighed 50 pounds and was considered obese. Both M1 and M2 were developmentally delayed and suffered from emotional problems. M3, who suffered the skull fracture, appeared to be developmentally on target. M1 and M2 adjusted well to placement.

By June 2010, Mother was being evicted from her home, had nowhere to go, and was behind on her bills. She was given referrals for counseling and random drug testing, and was attending parenting and anger management classes. On June 28, the father was arrested for domestic battery after allegedly punching Mother several times. The father was now homeless and wanted to get back together with Mother. Mother decided not to seek a restraining order against the father because there were too many forms to fill out. She continued to stay in contact with the father despite her own reports that he continued to harass and threaten her. The social worker was now concerned that Mother was unwilling or unable to protect herself or the girls, and encouraged Mother to take domestic violence classes.

Second amended petitions for the girls were filed in August 2010, and included domestic violence allegations. CFS continued to recommend no reunification services for either parent. On July 23, the father vandalized the family home, took the freezer and food, and poured motor oil all over Mother's clothing and Pine-Sol all over the furniture. The sliding glass door was shattered, the bedroom window was broken, and there was a

hole in the wall. Mother claimed she did not report the incident because she was being evicted anyway. Three days later, when Mother was visiting the girls on July 26, the home was completely destroyed. All of the windows were broken out, and all of Mother's and the girls' belongings were destroyed.

After the family home was destroyed, Mother began staying with a friend. CFS encouraged Mother to enter a domestic violence shelter and seek a restraining order against the father, and Mother said she would consider doing so. By September 2010, Mother had completed her parenting and anger management classes, but CFS continued to question her ability to parent the girls. Mother was still unemployed and had no source of income. The father had not visited the children, gone to court, or participated in any services. On September 22, a neighbor reported seeing Mother and the father together, and the father was planning for the girls to be returned to Mother.

At the jurisdictional hearing on October 4, 2010, the court found that the girls came within section 300, subdivisions (a), (b), (e), and (j). At the dispositional hearings on November 12 and 22, the court ordered reunification services for Mother and weekly, supervised visitation. No services or visitation were ordered for the father. Mother's case plan included a domestic violence program and recommended that she enter a domestic violence shelter.

By May 2011, Mother was still jobless and homeless, and was drifting from place to place for shelter. Mother visited the children weekly for two hours. At the May 23 six-month review hearing, Mother told the court she was participating in two domestic

violence classes, one in Redlands and one in Victorville. The Victorville program offered a certificate, and she had eight classes to complete. The court continued Mother's reunification services for an additional six months, and authorized CFS to liberalize the frequency and duration of her weekly, two-hour visits. The girls had been in their second foster care placement since June 2010, and the foster parents were willing to adopt them.

By November 2011, Mother had failed to follow through with and complete her domestic violence services, even though CFS had been providing her with bus passes and gas vouchers. Mother gave birth to another girl on October 12, and was living with her boyfriend, the newborn's father, and the boyfriend's mother. The social worker described Mother as "passive and unmotivated," and questioned Mother's ability to reunify with M1, M2, and M3 given her current circumstances. Mother had not completed her case plan, was questioning her need for domestic violence services, and did not have an appropriate place for the girls to live. Another social worker was assessing the needs of the newborn.

Mother was not disciplining the girls during visits, and once threatened to put hot sauce in their mouths to get them to listen. Mother was also "lazy" and would not get up and follow the girls when they tried to run away.

M1 was exhibiting aggression and other negative behaviors following her visits with Mother. M2 was emotionally needy, easily upset, and cried when the foster mother was out of her sight. M1 and M2 were receiving SART (Screening Assessment Referral Treatment) services, and were later referred to the Inland Regional Center. M3, who

appeared to be developmentally on target as an infant, was now "very delayed with speech and head circumference . . . approaching microcephaly." The foster parents were still willing to adopt the girls.

Mother's reunification services were terminated at the 12-month review hearing on December 19, 2011, and a section 366.26 hearing was set.[2] In its section 366.26 report, dated April 18, 2012, CFS recommended termination of parental rights and adoption as the girls' permanent plan. Mother had not visited the girls since her services were terminated on December 19, 2011. She canceled a February 2012 visit because her car was impounded, and she did not return the social worker's call, telling her she could visit with the girls by telephone. Since Mother stopped visiting the girls, M2's behavior had improved and she was doing well in school, prompting her teacher to ask the prospective adoptive parent whether there had been any changes in the home.

B *The Combined Section 388 and Section 366.26 Hearings*

The section 366.26 hearing commenced on April 18, 2012. Mother had recently moved and her counsel has lost contact with her, but she was waiting outside the courtroom. Her counsel told the court that she was involved in a domestic violence program, and he intended to file a section 388 petition and call her counselor as a witness. The court set the section 366.26 hearing contested and continued the matter to May 2.

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[2] Mother filed a notice of intent to file a writ petition on December 21, 2011. This court dismissed the petition on January 31, 2012, pursuant to a letter from Mother's counsel.

Meanwhile, on April 27, Mother filed a section 388 petition seeking reinstatement of her reunification services. In her petition, Mother said she was no longer living with the father of her newborn daughter because he had a criminal history that posed a danger to the child. She had recently moved to Big Bear City, where she "made contact with a domestic violence program" and had 26 separate "one-to-one" sessions with a counselor, Ms. Wendi Smith. In a two-page e-mail attached to the petition, Ms. Smith said she was a "retired Counselor from Family Services in Crestline," and listed "Dates of therapy and topics" Ms. Smith covered with Mother, from December 23, 2011 through April 20, 2012. According to Ms. Smith, Mother could complete the remaining domestic violence sessions by the end of May 2012.

On May 2, the court granted an evidentiary hearing on the petition following an in-chambers discussion with counsel. Mother was present in court. Mother's counsel expected to call Mother, Ms. Smith, and social worker Ronnetta Paullins to testify on the petition, and the parties stipulated that the testimony on the petition would be admitted at the section 366.26 hearing. Because Ms. Smith was not present in court on May 2, the court continued both matters to May 8. The court estimated that the combined hearings would take 90 minutes.

On May 8, Mother's counsel requested a further continuance because Ms. Smith was again not present in court. That morning, Ms. Smith called Mother and told her she was "throwing up blood and had to go to the hospital." Mother's counsel was unable to reach Ms. Smith by telephone. The court denied the request for a further continuance and

proceeded with the hearings. Mother testified on May 8. She explained how she had benefited from the domestic violence counseling sessions with Ms. Smith.

Contrary to her petition, Mother testified on cross-examination that she was still living with the father of her newborn daughter, Mr. Thomas. They were renting a room in a four-bedroom, two-bathroom house from a tenant who had a one-year lease on the house. Mother, Mr. Thomas, and the baby were living in the rented bedroom, and they had access to the kitchen and bathrooms. If Mother regained custody of M1, M2, and M3, then all four girls would stay in a master bedroom in the house, which Mother could rent for $100 a month more. Mother was still unemployed, and so was Mr. Thomas. They were living "on the County right now."

Mother also claimed, contrary to her petition, that Mr. Thomas had no criminal history. And, when asked what she thought she would need to do to better discipline the girls if they were returned to her care, Mother said she would need to talk to them and let them know what was wrong, and offered her opinion that the girls' behavioral problems stemmed from there being "too many people involved in" and "interfering with" her relationships with the girls.

After Mother testified, the court continued the hearings to May 10, partly in order to give Mother another chance to procure Ms. Smith's testimony. On May 8, Mother's counsel did not know Ms. Smith's whereabouts or whether she would testify on May 10, and he did not have a curriculum vitae for her.

After the court continued the matters to May 10, Mother's counsel asked the court whether CFS could provide Mother with transportation assistance to court on May 10. The court told counsel he could ask CFS "what they can do," but the court was not in a position to order CFS to provide transportation assistance to Mother. Counsel for CFS told the court that, according to the social worker, CFS was unable to provide Mother with transportation assistance.

On May 10, neither Mother nor Ms. Smith were present in court. Mother's counsel rested without offering any additional testimony, and Ms. Paullins testified for CFS. In addition to the testimony of Mother and Ms. Paullins, the court admitted reports and other documents into evidence on both matters, but excluded Ms. Smith's two-page e-mail which was attached to the petition. Counsel for CFS objected to the e-mail on hearsay grounds and because Ms. Smith was unavailable for cross-examination. CFS was unfamiliar with Ms. Smith's background and credentials, and questioned whether she was "authorized to provide any type of counseling" in California. Mother's counsel said he was not "that concerned about" Ms. Smith's e-mail because Mother's testimony adequately covered the issues.

At the conclusion of the hearings on May 10, 2012, the court denied the relief requested in the petition, terminated parental rights, and selected adoption as the girls' permanent plan. At the time of the hearings, M1, M2, and M3 were five, three, and two years of age.

III. DISCUSSION

A. *The Juvenile Court Properly Refused to Order CFS to Provide Mother With Transportation Assistance to the Section 388 and Section 366.26 Hearings on May 10, 2012*

Mother claims the juvenile court deprived her of her due process rights in refusing her request for transportation assistance from her home in Big Bear City to the final day of the section 388 and section 366.26 hearings in San Bernardino on May 10, 2012. We find no due process violation in the court's refusal to grant the requested transportation assistance.

To prevail on her due process claim, Mother must show she had a due process liberty interest in and "entitlement" to the requested transportation assistance. (*In re Christina A.* (1989) 213 Cal.App.3d 1073, 1078-1079.) She has not done so.

Transportation assistance may be provided to a parent to facilitate his or her participation in reunification services. (See § 300, subd. (j), second par. [listing "client transportation" among services that may be provided to promote family reunification].) But generally speaking, a parent has no constitutionally protected liberty interest in or fundamental right to reunification services. (See *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 750 [noting that Courts of Appeal have concluded there is no constitutional right to reunification services].) To the contrary, reunification services are a "benefit," and there is no constitutional "entitlement" to them. (*In re Derrick S.* (2007) 156 Cal.App.4th 436, 445; *In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 475.)

Mother argues that the court's refusal to order CFS to provide her transportation assistance to the May 10, 2012, hearings was "fundamentally unfair," given that CFS provided her with transportation assistance to court *before* her reunification services were terminated on December 19, 2011. She claims "[t]he post-setting hearings were not less important" than the presetting proceedings that took place before her services were terminated, because she was seeking further reunification services through her section 388 petition. Mother's arguments are unavailing.

To be sure, Mother's fundamental right to make decisions concerning the care and custody of the girls "is a compelling one, ranked among the most basic of civil rights," but as Mother concedes, her right is not absolute and must be balanced against the girls' rights to stability and permanency. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306-307; *Williams v. Superior Court* (2007) 147 Cal.App.4th 36, 48-49.) In any event, Mother had no due process right to transportation assistance to court after her reunification services were lawfully terminated. (See *In re Derrick S.*, *supra*, 156 Cal.App.4th at p. 445.) Thus, her due process rights were not violated when, on May 8, 2012, the court refused her request to order CFS to provide her with transportation assistance to the May 10, 2012, hearings.

In her reply brief, Mother argues that the transportation assistance she received before her reunification services were terminated should not be confused with her reunification services, but are "more analogous to the arrangements the juvenile court must ordinarily make to transport a prisoner [to court] pursuant to Penal Code, section

2625, subdivision (d)." Mother also points out that transporting her to hearings on May 10 was "no more, and probably less, burdensome on the court than arranging for a parent to be brought in from state prison." This argument is unavailing. The statute only allows the court to make an order for the transportation of a "prisoner" to court, and Mother was not "a prisoner" on May 10, as the statue defines the term. (Pen. Code, § 2625, subds. (a), (d); see *In re Barry W.* (1993) 21 Cal.App.4th 358, 365-371 [court did not abuse discretion in denying prisoner's request for transportation to Welf. & Inst. Code, § 366.26 hearing involving his dependent son].) Mother was not in state or local custody on May 10, and was free to arrange for her own transportation to court.

B. *The Juvenile Court Did Not Abuse Its Discretion or Violate Mother's Due Process Right to Present Evidence in Refusing to Continue the Section 388 and Section 366.26 Hearings Beyond May 10 to Allow Mother More Time to Locate Ms. Smith, or in Concluding the Hearings in Mother's Absence*

Mother further claims the court deprived her of her "[c]onstitutional rights to [p]resent [e]vidence" when, on May 8, 2012, the court denied her request to continue the section 388 and section 366.26 hearings to allow her more time to procure the testimony of Ms. Smith, and when, on May 10, 2012, the court concluded the hearings in her absence. We reject each of these claims.

First, the court properly refused to continue the hearings beyond May 10 so that Mother would have additional time to procure the testimony of her counselor, Ms. Smith. Continuances are disfavored in child dependency cases, and are not to be granted unless

good cause is shown and if contrary to the interest of the minor. (*In re Giovanni F.* (2010) 184 Cal.App.4th 594, 604; § 352, subd. (a).)[3] A court's denial of a request for a continuance will not be disturbed on appeal absent an abuse of discretion. (*In re Elijah V.* (2005) 127 Cal.App.4th 576, 585.)

On May 2, the court determined that it would allow a limited evidentiary hearing on Mother's section 388 petition. Ms. Smith, who provided documentary support for the petition in a two-page e-mail, was not present in court on May 2. The court continued the hearing to May 8 so that Mother might locate Ms. Smith. Then, when Ms. Smith did not appear on May 8, the court refused to continue the hearing beyond May 10.

On May 8, when the further continuance was requested, Mother's counsel did not know Ms. Smith's whereabouts, or whether she was willing or able to testify in support of Mother's section 388 petition, at any time. Then, on May 10, Mother's counsel effectively admitted that Mother's testimony rendered Ms. Smith's testimony unnecessary and duplicative. When counsel for CFS objected to the admission of Ms. Smith's two-page e-mail on hearsay grounds, Mother's counsel said he was "not that concerned" because Mother's testimony covered the relevant issues.

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[3] Section 352, subdivision (a), provides: "Upon request of counsel for the parent . . . the court may continue any hearing under this chapter beyond the time limit within which the hearing is otherwise required to be held, provided that no continuance shall be granted that is contrary to the interest of the minor. . . . [¶] Continuances shall be granted only upon a showing of good cause and only for that period of time shown to be necessary by the evidence presented at the hearing on the motion for the continuance."

Further, "[a] parent's right to due process is 'limited by the need to balance the "interest in regaining custody of the minors against the state's desire to conclude dependency matters expeditiously . . . ."' [Citation.] Accordingly, in dependency proceedings, '[t]he court must control all proceedings with a view to quickly and effectively ascertain[] the jurisdictional facts and all information relevant to the present condition and welfare of the child.' (Cal. Rules of Court, rule 5.534(a).)" (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1464.)

Given that Ms. Smith's whereabouts were unknown, her proffered testimony was largely duplicative of Mother's, and in view of the girls' interest in promptly concluding the proceedings, the court neither abused its discretion nor violated Mother's due process rights in refusing to continue the hearing beyond May 10.

Mother also complains that because she was unable to be present in court on May 10 due to her lack of transportation, she was unable to rebut Ms. Paullins's testimony or other department evidence opposing her section 388 petition, and assist her counsel in representing her interests in the proceedings. She argues that her counsel's argument for a less restrictive plan than adoption at the section 366.26 hearing was not what she wanted; she wanted her children immediately returned.

Before parental rights may be terminated in a juvenile dependency proceeding, due process requires that the interested parent be given adequate notice and an opportunity to be heard. (*In re B.G.* (1974) 11 Cal.3d 679, 688-689; *Adoption of B.C.* (2011) 195 Cal.App.4th 913, 925 [Fourth Dist., Div. Two].) Due process also generally

requires that the parent be given "the right to present evidence, and to cross-examine adversarial witnesses, such as the caseworker and persons whose hearsay statements are contained in the reports, 'i.e., the right to be heard in a meaningful manner.' [Citations.]" (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 915.) The general rule, however, "is that personal appearance by a party at a civil proceeding is not essential; appearance by an attorney is sufficient and equally effective." (*In re Dolly D.* (1995) 41 Cal.App.4th 440, 445.)

Here, Mother had ample notice of the hearings and a meaningful opportunity to consult with her counsel, despite her absence on May 10 when the hearings concluded. Further, the presence of her counsel throughout the hearings, including on May 10, was sufficient to protect her due process rights to present evidence.

Mother testified on May 8, explaining how she had benefited from her "one-to-one" domestic violence course with Ms. Smith, and how the girls' best interests would be served by granting her additional reunification services and ultimately returning the girls to her care. Even though Mother was not present when Ms. Paullins testified on May 10, Mother's counsel was present and thoroughly cross-examined Ms. Paullins.

Mother does not explain what additional evidence or cross-examination questions she would have presented, through her counsel, had she been present in court on May 10. Well before May 10, Mother had notice of the contents of the reports that the court admitted into evidence, of CFS's opposition to her section 388 petition, and that Ms. Paullins would testify on May 10. Given that Mother had adequate notice of the

hearings, and a meaningful opportunity to be heard through her counsel, the court did not violate her due process right to present evidence by concluding the hearings in her absence.

IV. DISPOSITION

The orders denying the relief requested in Mother's section 388 petition, terminating parental rights, and placing M1, M2, and M3 for adoption are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.